Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

80-738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

In re Pennhurst Parents-	:	Nos. 79-1404
Staff Association,	:	79-1408
	:	79-1414
Petitioner and Movant	:	79-1415
	:	79-1489

PETITIONERS' PENNHURST STATE SCHOOL AND HOSPITAL, ET AL., PETITIONERS IN NO. 79-1404, MEMORANDUM OF LAW IN SUPPORT OF PETITIONER PENNHURST PARENTS-STAFF ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA OR, IN THE ALTERNATIVE, FOR MODIFICATION OF THIS COURT'S STAY ORDER OF JUNE 30, 1980.

Pennhurst State School and Hospital, et al. ("Commonwealth"), hereby join in the Petition for Writ of Mandamus and Prohibition filed by the Pennhurst Parents-Staff Association insofar as that Petition seeks to bar, pending final review by this Court, the District Court's control of and detailed supervision over Pennsylvania's community placement program. Indeed, that Petition expressly adopts precisely the interpretation of this Court's Order of June 30, 1980 that the Commonwealth urged unsuccessfully upon the District Court. See Petition at 13, n. 9. If that is not the proper interpretation, the Commonwealth joins in Petitioners' alternative prayer for modification to the extent it seeks to end the District Court's direct involvement in the placement process.

However, while joining in the Petition, the Commonwealth wishes to emphasize its current policy supporting the placement of mentally retarded persons into appropriate community-based settings. Further, the Commonwealth wishes to affirm its intent to diligently pursue the implementation of this policy separate and apart from the present orders of the District Court. Thus, the Commonwealth seeks enforcement of this Court's order for reasons different, in some respects, than those asserted by the Association.

In this regard, it is important to note why the Commonwealth did not join in Petitioners' prior application for a stay. The significance of its absence was heavily and properly relied upon by Respondents in opposing its grant. The Commonwealth hoped at that time that the bureaucratic structure created by the District Court would promote and not unduly hinder placement efforts. It also feared that a stay might restrain as well its own placement program.

Neither those hopes nor fears have proven justified. The multi-layered judicial bureaucracy has proven to be a substantial hindrance to Pennsylvania's placement program. Valuable resources--approximately $75,000 per month--that could otherwise be devoted to providing services, are consumed in salaries of the Special Master and Hearing Master. In fact, those monthly salaries could fund placements for a full year for as many as three mentally retarded persons. Equally draining of limited resources are the extensive "voluntariness" hearings held before the Hearing Master at which attendance of high-level Commonwealth staff is often compelled.

Even more significantly, the two Masters' offices necessarily delay and frustrate the Commonwealth's programs. Absent the District Court orders, an appropriate community setting could be identified, consents to placements obtained (from an individual and/or parent/guardian) and the placement made. Now that this process is court-controlled, placement can be made only after approval by the Special Master and a hearing and report by the Hearing Master, which report is then subject to exceptions[1] and responses thereto filed in the District Court. The delay in this overdose of procedure is apparent.

Finally, this court-controlled process has lacked all incentives to control the expenditure of public funds--and it has dramatically failed to do so. Although the District Court previously found that community care was comparatively inexpensive--$17.64 per individual per day in 1976--446 F. Supp. at 1312--the average per diem cost for 15 children recently placed in CLAs under court supervision has been $120.88 per day, ranging from $90.26 to $230.00 per day. See Affidavit of Michael Bennett, attached hereto as Exhibit A. These escalating costs reflect directly the lack of cost controls--or any concern for the public fisc--among the Masters' Offices and the Court. They are directly attributable to the usurpation of Commonwealth authority.

Grant of Petitioners' Motion will permit Pennsylvania to get on with its placement program unhindered by these many obstacles. Indeed, in the interim between this Court's order and the District Court's interpretation of it, Pennsylvania moved quickly to reinstate that program. A meeting with county

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[1] The Commonwealth has filed exceptions in four instances contending that various "orders" issued by the Hearing Master exceed his authority. Other parties have filed exceptions as well. None of these exceptions have ever been ruled upon by the District Court.

officials to organize ongoing placement efforts was scheduled, only to be cancelled in light of the Court's order. See Affidavit of Jennifer Howse, PhD, attached hereto as Exhibit B. Nor need Respondents fear any harm. Even plaintiffs' experts concurred at trial that Pennsylvania's CLA program is among the nation's best. Glenn N.T. 6-51, 6-69; Conley 12-26, 12-38.

It is to permit that program to continue and prosper and to restore full responsibility to the governmental officials to whom it properly belongs, that the Commonwealth joins in the Petition for a Writ of Mandamus and Prohibition.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that a writ of mandamus and prohibition issue to The Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, compelling that court's compliance with this Court's order of June 30, 1980. In the alternative, the Commonwealth requests that this Court stay the district court's order of July 15, 1980, and that the Court modify its previous order of June 30, 1980 to bar, pending final review by this Court, the District Court's control of and detailed supervision over Pennsylvania's community placement program.

Respectfully submitted,

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation

ROBERT B. HOFFMAN
Deputy Attorney General

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COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF DAUPHIN :

AFFIDAVIT

I, Michael Bennett, being duly sworn in accordance with law, state the following is true and correct to the best of my knowledge, information and belief.

1. I am employed as a Welfare Program Officer by the Pennsylvania Department of Public Welfare and have held that position since January of 1980.

2. My responsibilities in that position include supervising and monitoring the placement of Pennhurst residents to community facilities.

3. In Pennsylvania, community facilities and services are provided by private parties pursuant to contracts entered into with the counties.

4. Since July of 1980, fifteen school-aged children have been moved from Pennhurst into community placements under federal court control and supervision, following hearings before the court-approved Hearing Master.

5. Based on the contracts pursuant to which those community services are being provided, the average daily cost of those placements is $120.88, the least expensive placement

costs $90.26 per day and the most expensive placement costs $230.00 per day.

Michael Bennett

MICHAEL BENNETT
Welfare Program Officer
Pennsylvania Department of
Public Welfare

Sworn to and Subscribed

Before me this 31st day

of October, 1980.

Rosanne M. Sears, Notary Public
My commission Expires Sept. 26, 1983
Harrisburg, PA Dauphin County

Notary Public

My Commission Expires:

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF DAUPHIN :

AFFIDAVIT

I, Jennifer Howse, PhD, being duly sworn in accordance with law, state that the following is true and correct to the best of my knowledge, information and belief.

1. I am Deputy Secretary for Mental Retardation, Pennsylvania Department of Public Welfare and have served in that position since January 14, 1980.

2. I have extensive experience in directing community placement of mentally retarded individuals. I served from 1975-1978 as Executive Director of the court-appointed Review Panel in New York State Association for Retarded Children v. Carey, (the "Willowbrook" case) and from 1978 until January 1980 as Associate Commissioner, New York State Office of Mental Retardation and Developmental Disabilities.

3. Following receipt of the Supreme Court's Order of June 30, 1980, I moved promptly to reinstate Pennsylvania's community placement program outside the aegis of the District Court.

4. By letter of July 8, 1980, sent to mental retardation officials in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties, I organized a meeting for July 17 to plan those future placement activities. A true and correct copy of that letter is attached hereto as Exhibit 1.

EXHIBIT B

5. Upon receipt of Judge Broderick's Order of July 14, 1980, stating that the District Court would continue to control the placement process, that meeting was cancelled.

6. If the Petition for Writ of Mandamus and Prohibition is granted, I will reinstate those efforts.

7. In my opinion, staff of the Department of Public Welfare and county officials are fully capable of implementing appropriate community placements without the direct involvement and control of the District Court.

Jennifer Howse

JENNIFER HOWSE, PhD
Deputy Secretary for Mental Retardation
Pennsylvania Department of Public Welfare

Sworn to and Subscribed
Before me this 31st day
of October, 1980.

Roxanne M. Cross, Notary Public
My Commission Expires Sept. 25, 1982
Harrisburg PA
Dauphin County

Notary Public

My Commission Expires:

The attached letter was sent to the following persons:

Patricia C. Sweigert, Administrator
BUCKS COUNTY DEPT. OF MH/MR
Neshaminy Manor Center
Doylestown, PA 18901

William A. McKendry, Administrator
CHESTER COUNTY MH/MR PROGRAM
24 South New Street
West Chester, PA 19380

P. Paul Burrichter, Administrator
DELAWARE COUNTY MH/MR PROGRAM
280 North Providence Road
Media, PA 19063

Patricia Moir, Acting Administrator
MONTGOMERY COUNTY MH/MR PROGRAM
Montgomery County Courthouse
Swede and Airy Streets
Norristown, PA 19404

Leon Soffer, Ph.D., Administrator
PHILADELPHIA COUNTY OFFICE OF MH/MR
1405 Locust Street, 6th Floor
Philadelphia, PA 19102

EXHIBIT 1

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF MENTAL RETARDATION
JENNIFER L. HOWSE, Ph.D.
DEPUTY SECRETARY

TELEPHONE
AREA CODE 717,

July 8, 1980

In view of the status of the Pennhurst litigation, the Department of Public Welfare, Office of Mental Retardation would like to clarify the Commonwealth's policy and direction for placements. The Commonwealth would like to proceed with all appropriate planning to ensure the development of community resources in the Southeast Region, the timely movement of clients to community living arrangements, and an improved staff ratio at Pennhurst Center. I would like the opportunity to discuss the following issues with you on Thursday, July 17th at 10:00 A.M. at the Philadelphia County Office.

1. Placement of the Pennhurst school-aged clients. The Commonwealth and the counties would proceed with the planning for movement of the school-age children. At least twenty (20) days prior to projected movement of any individual, the county would submit the completed IHP to the Pennhurst Implementation Team, Office of Mental Retardation and to the Office of the Special Master.

Within ten (10) days of receipt of the IHP, the Office of the Special Master shall submit written comments on the IHP to the county and the Pennhurst Implementation Team. If approval is granted by OMR, the county would proceed to notify the resident, parent/guardian and/or the advocate of the projected movement date. If no objections are raised, the county may proceed to move the client. If parental objection occurs, the county would make all attempts to resolve parental concerns and reactivate the movement process.

If, however, after reasonable attempts the county is unable to reverse the parental objection, it would cease placement activities for that client.

The county may then identify another Pennhurst Class member of similar characteristics residing at either Pennhurst, Embreeville, or Woodhaven, who could benefit from the services developed. The county would seek the approval of OMR (Regional Office) to proceed with placement activities for this individual.

An IHP developed for any individual not residing at Pennhurst would be approved by you and forwarded to the OMR Regional Office for approval. If approval is granted by OMR, the county would proceed to notify the resident, parent/guardian, and/or the advocate of the projected movement date.

The counties would proceed to identify sites needed in order to accommodate the school-age children. These are (1) one site for one client in Chester County and (2) six sites for ten clients in Philadelphia County.

The counties would proceed with the development and completion of IHP's. These are (1) ten IHP's in Philadelphia County and (2) one IHP in Montgomery County.

The counties would develop placement projections for the eighteen (18) school-age children with no projected movement date. These are (1) one in Chester County, (2) three in Delaware County, (3) one in Montgomery County and (4) 13 in Philadelphia County.

A modified Notice of Placement, will be forwarded to the county which allows the parents to indicate their approval of the movement or their objections. The county would make all attempts to reverse parental objections by addressing their concerns and attempting resolution of the issues. Where resolution cannot be accomplished, the county would cease the movement process for that client.

2. Future Placement Planning. Staff at Pennhurst Center have begun to identify approximately 65 clients for Request for Proposal (RFP) development in the Southeast Region. This first phase of placement planning will be for CLA development; at least one subsequent round of RFP's will be issued for small ICF/MR development. At the July 17th meeting I would like to share for your review and comment some proposed steps and procedures for identifying and grouping the clients, developing and issuing the RFP's, and monitoring the providers' progress in establishing the new services.

3. IHP Guidelines. As you are aware, the Office of the Special Master met with representatives of the counties and OMR to receive specific comments and feedback on the draft revision of the IHP Guidelines. Based on suggestions made by your representatives at the meeting that each county should develop its own guidelines under your direction, OMR will provide the counties with a list of basic requirements or objectives which at a minimum should be met in IHP planning. I am asking you to direct that your staff develop and submit for OMR approval your IHP guidelines reflecting the staff, timing, and process you support and are prepared to implement to satisfy the basic requirements promulgated by OMR. The Regional Office and the Pennhurst Implementation Team are prepared to provide you any consultation and/or technical assistance the county would like to request to expedite the development of each county's guidelines. I will be prepared to disseminate the requirements, the recommendations for format and the timeframes for development at the July 17th meeting.

The Department of Public Welfare and the counties have a long standing commitment, which pre-dates this litigation, to the development of community services and the movement of institutionalized clients to less restrictive settings. Your continued support and effort to meet our mutual goals is critical. I am looking forward to working through your questions and the details of our placement strategy at our meeting.

Sincerely,

Jennifer L. Howse, Ph.D.

cc: Helen B. O'Bannon
Jonathan Vipond, III, Esquire
Robert Hoffman, Esquire
Allen Warshaw, Esquire
Thomas M. Kittredge, Esquire
Pennhurst Implementation Team
OMR Executive Staff
Russell G. Rice, Jr., Ed.D.
George A. Kopchick, Jr.
Marc Myers, Esquire

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CERTIFICATE OF SERVICE

I, Allen C. Warshaw, Deputy Attorney General, Chief, Civil Litigation, hereby certify that on October 31, 1980, I caused to be served the foregoing Petitioners' Pennhurst State School and Hospital, et al., Petitioners in No. 79-1404, Memorandum of Law in Support of Petitioner Pennhurst Parents-Staff Association's Petition for Writ of Mandamus and Prohibition to the United States District Court for the Eastern District of Pennsylvania or, in the Alternative, for Modification of this Court's Stay Order of June 30, 1980 by first class mail, postage prepaid, upon the following:

David Ferleger, Esquire
37 South Twentieth Street
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Honorable Wade H. McCree, Jr.
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Allen C. Warshaw

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation